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Supreme Court of the United States

OCTOBER TERM, 1941

No. 72

GEORGE T. MORTIMER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner.

THEODORE KIENDL,
CHRISTOPHER SARGENT,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1941

GEORGE T. MORTIMER, Petitioner, v. THE UNITED STATES OF AMERICA, Respondent.	No. 72

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement

A major question presented upon the petition is

"Whether the Circuit Court of Appeals erred in its construction and application of the Federal Conspiracy Statute, Title 18, Sec. 88 U. S. C. A.?" (Pet. 8*).

This question is the core of reason "6" urged by petitioner for allowance of the writ (Pet. 10-11), and is specified as assigned error "5" (Br. 10). Petitioner's argument thereon is briefly stated in subdivisions "IV" and "V" of the Petition (11-12).

Consideration of this question involves an examination into the facts, as they relate to petitioner. Petitioner's contention, in this connection, is that the entire Record establishes his innocence, and that the learned Circuit Court's affirmance of his conviction is due, in part, to an erroneous construction and application of the Federal Conspiracy Statute (Title 18, Sec. 88 U. S. C. A.) and of *United States* v. *Dilliard* (101 F. 2d 829, 2 Cir.), and *United States* v. *Bob* (106 F. 2d 37, 2 Cir.).

* Reference and Citations to the Petition, Brief and Government's Brief are pages, in each instance.

The prosecution, fully conscious of petitioner's unjust conviction, devotes a very major portion of its Brief herein to a final attempt to sustain that conviction.

The Government in urging that the Record establishes that petitioner participated in the alleged frauds and conspiracy claims (1) That the Company engaged in an intensive selling campaign, during 1931 and 1932, in the course of which certain alleged false representations were made (Gov. Br. 4-5), (2) that the petitioner participated in the making of said false representations (Gov. Br. 5), (3) at a time when the Company was, to the knowledge of petitioner, insolvent, (4) that the existence of defaults and arrears as to guaranteed mortgages and certificates were purposely concealed (Gov. Br. 6), (5) that, upon instruction from petitioner (and others), the current appraisals of the real estate, against which guaranteed mortgages and mortgage certificates were issued, were raised or "jacked up" (Gov. Br. 6-7), (6) that the Company's power of substitution of collateral, provided for in the case of group series certificates, was improperly used so as to impair the mortgage security protecting the certificate holders (Gov. Br. 7), (7) that certain subsidiary corporations, wholly owned by the Company, took title to properties acquired by the Company on foreclosure and that against these properties the Company made new mortgage loans on appraisals in excess of the actual value of the properties (Gov. Br. 7), and, finally, (8) the alleged practice of the Company in using "dummy" bondsmen (Gov. Br. 8).

A fair, dispassionate, and complete examination of the Record—even of those fragments relied on by the Government—discloses petitioner's innocence of the frauds and conspiracy charged, and of the grave injustice and error committed by the learned Circuit Court in applying the principles of *United States* v. *Dilliard, supra,* and *United States* v. *Bob, supra,* to the facts of the instant case, as they relate to petitioner.

POINT I

The petitioner, manager of the physical real estate properties of the New York Title and Mortgage Company, during 1931 and 1932, did not knowingly participate in the alleged frauds and conspiracy.

A

As to sales and the company's alleged false advertising.

The uncontradicted proof is that the acquitted defendant Shields was in charge of sales (R. 49*; 50; 53). Shields was head of the Sales Department, and was, in turn, responsible to defendant Williams, the General Manager and Chief Executive Officer. Williams testified that in supervising the Sales Department *he* kept in touch with the Company's sales force, addressed special meetings of salesmen, and gave them instructions to carry out in selling mortgages and certificates (R. 1941; 1946-47); also, that *he* (Williams) instructed defendant Burdett, in March 1932, to make an investigation of group series F-1, B, K, Q, and C-2 for the purpose of determining whether the Company should continue the sale of certificates against mortgages deposited in those group series (R. 5526-34); and that although *he (Williams)* knew, in 1932, about tax defaults he permitted sales of guaranteed mortgages and certificates to continue (R. 5687-89); except that in March, 1932, after conference with defendants *Burdett*, and *Kahler*, and with the Company's Treasurer, *Obermeyer*, further sales in group series C-2 were stopped (R. 5525-35; 5542-46; Defts'. Ex. M (2); 9973). Government witneess Hawkwood stated that it was defendant *Williams* who, either directly or through Eitelbach, gave Hawkwood instructions with respect to salesmen (R. 55, 57). *Williams* testified he received

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*References and citations to the Record (R), are by folio, unless otherwise indicated.

all reports, and kept himself fully informed as to what was going on (R. 5808-9).

The Record is barren of any proof that petitioner directed or participated in the activities of the Sales Department, or that he had anything to do with any of the sales to the alleged victims. Government witnesses Baruch and Hawkwood both testified that sales were not under the supervision of petitioner (R. 509; 142-177). The proof does not, even remotely, connect petitioner either with the specific sales charged in the indictment, or with the Company's sales generally through its Sales Department.

Petitioner did not prepare or authorize the particular advertising and sales literature referred to in Government's Brief, at page 4 (consisting of certain newspaper advertising (R. pp. 2557-2726), circular letters (R. pp. 57, 2727A) and pamphlets (R. pp. 123-4). As to the newspaper advertising complained of (Gov. Ex. 418) the proof is uncontradicted that about August 1930 (shortly after petitioner became President) the entire advertising for the Company was taken over by the Manhattan Company (the New York Title Mortgage Company having become a unit of the Manhattan Company about December, 1929), and that all advertising for the Company was prepared in the Central Advertising Bureau of the Manhattan Company, 40 Wall Street, New York City, under a Mr. Alexander, assisted by a Mr. Foster and a Mr. Tuttle (R. 5409-10). The Government produced no printer's proof of these newspaper advertisements (Gov's. Ex. 418) which are either okayed or initialed by petitioner.

True, petitioner prepared certain specific types of newspaper advertising which he approved as the type of advertising the New York Title and Mortgage Company should use (Defts'. Exs. U (2), V (2), W (2), and X (2), pp. 3334-41). This type of advertising, which was not produced or offered by the prosecution, was widely published and used by the Company (Defts'. Exs. Y (2), and Z (2); pp. 3342-54). The following (Defts'. Ex. V (2)), which

is typical of the only advertising ever approved or prepared by petitioner, is definite documentary refutation of the charge against petitioner:

"GUARANTEED
MORTGAGE INVESTMENTS

From $100 up

NEW YORK TITLE
AND MORTGAGE COMPANY

135 Broadway 295 Madison Avenue"
(R. p. 3336).

The circular letters referred to (Gov's. Br. 4), being Gov's. Exs. 427 (R., p. 2727 a) and 434 (R. 476-88), were neither prepared by petitioner, approved by him nor sent out with his knowledge or consent. Government's Exhibit 427 was a Company jacket design for enclosing interest checks, and consisted, in part, of a circular letter, dated April 30th, 1932, addressed "to the holders of our guaranteed first mortgage securities"; the evidence being that the printed matter was prepared by Government witness Tuttle and submitted to his superior, Mr. Alexander, of 40 Wall Street, head of the Advertising Department of the Manhattan Company; and that, upon being approved by Alexander, was, like other circular letters (Gov's. Exs. 431, 432, 433, 1055 and 1056 A) sent out by a letter servicing agency which signed petitioner's name to the circular letter, upon Alexander's instructions (R. 451-2). Petitioner testified that he had not approved this circular letter (Ex. 427) before it went out. He was positive, after seeing it in Court, for the first time, that he would not have okayed or approved it had it come to his attention (R. 5004-6).

Government witness Tuttle testified, with respect to Government Ex. 434,—a circular mimeograph letter, dated March 28, 1932, addressed to Walter Hinkle,—that it was not signed by petitioner (R. 482). Petitioner never saw this mimeographed circular letter before it went out (R. 4923-4),

although several hundred copies, returned to the Company because wrongly addressed, came to his attention *later on* (R. 4995-5001). This particular copy of the mimeograph letter (Gov. Ex. 434) was returned to the Company by the addressee, Mr. Hinkle, who wrote a long hand memorandum on the face thereof to the effect that his mother had lost some $15,000 in "guaranteed real estate mortgages," stating further "I will say she did not have any investments in your company." This circular letter, after it came back from Mr. Hinkle, was referred to petitioner, who wrote a notation (on the back of the letter) addressed to "E. H. H." (E. H. Habinghorst, an employee of the Company), suggesting that some one see Mr. Hinkle and explain to him the difference between a guaranteed mortgage and a bond issue.

Gov. Ex. 1055 (R. p. 3194), a circular letter, dated March 14, 1932, referred to in Government's Brief, at page 5, was not signed by petitioner but bore a lithograph of his signature (R. 1658). There is no evidence that petitioner authorized this circular letter, or the use of his lithograph signature thereon, or had anything whatever to do with its preparation and distribution.

The pamphlets referred to in Government's Brief, at page 4, represented by Government's Exhibits 419, 420, 421 (R. pp. 122-4), were titled "Ideal Investment." There is absolutely no proof that petitioner had anything to do with the preparation or distribution of "Ideal Investment." This pamphlet was prepared about 1920 by Edgar J. Levey, one of the ranking officers of the Company at that time, and had been used by the Company for 10 years prior to the time petitioner became President (R. 5407-8). Government witness Tuttle testified "I do not know of any changes. There may have been minor changes" (R. 365); and, with respect to some minor changes which had been made in the pamphlet, in 1932, that the same had been submitted to defendant Shields, in charge of the Sales Department, or to Mr. Ackerman one of his subordinates (R. 365-7).

B

The company's alleged insolvency.

The Government's contention that the Company was insolvent during 1931 and 1932 is not supported by the testimony of Government witness Obermeyer, Treasurer of the Company, or the documentary proof (Pet. 6-7). Mr. Frederic J. Fuller, who succeeded petitioner on December 1, 1932 as President of the Company, made a thorough investigation of the financial condition and affairs of the Company before he agreed to accept the presidency (R. 5969-71). Mr. Fuller, at the time, was a senior vice president and the trust officer of the Central Hanover Bank and Trust Company, New York City, a sound banker with wide experience in trust investments. The investigation, which he personally made, convinced him that the Company was financially sound and that he could properly and safely become its President (R. 5969-71; 6059-65).

The fact that, in November, 1931, the Company invoked the 18 months delayed payment clause contained in specific series certificates is no proof of the Company's alleged insolvency. The Company, by doing what it had a right to do, in accordance with the provisions of the specific* mortgage certificates, was exercising a measure of caution and good judgment at a time of nationwide economic stress and depression. And the evidence is that every holder of the group series guaranteed mortgage certificates was paid his interest as it became due up to January 1st, 1933; and that all holders of group series certificates had also been

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*The guaranteed mortgage certificates were sold either in group series or specific series. A specific series consisted of a single mortgage, deposited with the Depositary, against which certificates were sold. Certificates in specific series contained a provision giving the Company an 18 months grace period within which to pay the principal amount of the certificate after it became due. This provision was known as the 18 months deferred payment clause. Group series certificates were issued against group mortgages deposited with the Depositary, the Company having the right to substitute different mortgages in place of the mortgages originally deposited as collateral for the certificates. Certificates issued in the group series did not contain any deferred payment provision.

paid the full amount of their certificates as and when they became due in every case where the certificates, properly endorsed and accompanied by the necessary documents, had been presented for payment. Such was the testimony of Government's witness Obermeyer (R. 1274-6). Furthermore, the fact is that the Company's checks had actually been drawn and were ready to go out for payment on December 31, 1932 (thirty days after petitioner had resigned as President), to all certificate-holders who were entitled to their money on January 1st, 1933; but the new President, Mr. Fuller, gave orders, at the last minute, that these checks should not be sent out (R. 1297-8). The Company, up to January 1st, 1933, made all payments due and payable to certificate-holders, in the specific series, in accordance with the terms of said certificates. It is true that the Company, in accordance with the terms and provisions of the specific series certificates, enforced the above-mentioned 18 months deferred payment clause; but, as Government witness Obermeyer testified, every single person whose specific certificate was due and the 18 months clause had elapsed had been paid through December 1932 (R. 1298-1303; Gov. Exs. 511, 513).

Pressing its charge that the Company was insolvent, to the knowledge of the petitioner, the statement is made (Gov. Br. 5) that "petitioner admitted that by the beginning of 1932 the company's financial situation had become alarming (R. 1731-1732, 1735-1736)." Examination of the portions of the Record cited discloses that petitioner made no such statement or admission. What the petitioner did state was that *"our foreclosures* in 1931 had reached an alarming point" (R. p. 1731); and that, "it was not until February, 1932, that we really became alarmed" (R. 5204, p. 1735). Most businessmen of sound judgment, when they saw first England, and then the United States, go off the gold standard and economic conditions get gradually worse in 1932, did become, as did petitioner, alarmed (R. 5195-6). But the Government's attempt to translate this alarm into

alleged insolvency of the Company is an argumentative feat which has no factual foundation.

The Government, further pressing its claim of the alleged insolvency of the Company, states (p. 5 of its Brief) that "All of this was forcibly brought home to petitioner at the time (R. 2843)". This reference is to Gov. Exs. 519, 520 and 521, which are confidential forecasts written in pencil by the Company's Treasurer, *Obermayer,* in the Spring of 1932, at the special request of defendant *Williams* to whom they were delivered (R. 1010-20). These confidential forecasts were used by defendants *Williams* and *Kahler* in their negotiations for loans from the R. F. C. Neither Obermayer nor any one else ever gave these papers, or a copy of them, to petitioner (R. 4917). Obermayer testified that he respected the request of defendant Williams that these forecasts remain confidential and that he communicated the information therein contained *to no one but Williams* (R. 1398-1400). This corroborates petitioner's testimony to the effect that neither Obermayer, nor any one else, ever gave him a copy of these confidential forecasts (R. 4917).

C

Petitioner neither knew of, nor misrepresented, nor concealed the situation as to defaulted mortgages.

Petitioner did not know that mortgage certificates were being sold against mortgages which were in default as to interest or taxes, nor that mortgages which were in default were deposited against certificates to be sold (R. 4935). Petitioner always understood that as soon as mortgages got in default they were withdrawn from the Group Series (R. 4935).

The numerous Reports (Gov. Exs. 1063, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1077, 1078, 1079, 1081, 1082), made to petitioner in connection with *the rental and management* of the vast quantity of real estate

acquired by the Company on foreclosure or operated under assignments of rent, contained no information as to what mortgages were in Group Series or as the condition of the mortgages in the various Group Series.

Petitioner had nothing to do with the deposit or substitution of mortgages in Group Series. Government witness Obermayer, the Company's Treasurer, testified that he (Obermayer) was the one who was charged with making deposits of mortgages in Series, and of withdrawing and making substitutions thereof (R. 1231-2; 1270). Obermayer informed defendants *Kahler* and *Williams* of these withdrawals and substitutions (R. 1286-7), but not petitioner. The Government (Gov. Br. 7) makes special reference to the alleged improper substitutions of mortgages made in order to provide collateral for a loan by the Reconstruction Finance Corporation to the Company, in September, 1932. But here, as in the case of other charges made against petitioner, the Record,—even that part cited by the Government (R., pp. 394; 1245)—exonerates petitioner. The fact is, as testified to by Government witness Obermayer (R., pp. 394-6), he (Obermayer) discussed with defendants *Williams* and *Kahler* (but not with petitioner) the necessity of withdrawing mortgages from Group Series to be used as collateral for the proposed R. F. C. loan and of making substitutions of other less desirable mortgages in place of those withdrawn. Obermayer further testified:

> "I conferred with the RFC in picking out the mortgages that would act as collateral security for the loan. They accepted or rejected them as they were submitted. I alone conducted negotiations as to what mortgages would be submitted to them" (R. 1268-9) * * * "We furnished additional statements of collateral at different times, for additional loans. Each time I conducted the negotiations we gave them collateral that would be satisfactory to them, after they had fixed the exact amount of the loan they would give us. If a mortgage which was to be sent to the Reconstruction Finance Corporation was in a series, *I would take it out and put in another in its place*" (R. 1270). (Italics ours.)

The letter referred to in Government's Brief (p. 6), advising certificate holders that "If a mortgage deposited under this issue is foreclosed, it is removed from deposit and a mortgage in good standing is substituted", was written by defendant *Shields* (Gov. Ex. 1016; p. 3177). Petitioner never authorized that information as to the condition of mortgages or certificates be withheld from investors; instead, as early as January, 1931, he instructed that all correspondence and inquiries be answered promptly by letter, and that, if the information requested could not be immediately given, receipt of the investor's letter should be acknowledged immediately and a date given when the correspondent might expect a further and complete reply (Defts'. Ex. (0) (2); R. pp. 3327-8).

D

Petitioner did not make, or direct that false appraisals be made.

Appraisals were made by the Loan Committee after examination of the property by the Loan Officer and Appraiser, defendant Brietweisser, or one of his assistants, based on his reports and recommendations to the Committee. Breitweisser testified that appraisals were his problem; that he looked into the matter and decided what the values were, and that he then took the matter up with the Loan Committee which acted upon his reports. On some occasions the values of the appraiser were modified by the Committee. The testimony of Government's witness Shapiro, Chief Appraiser for the Company, contradicts the Government's contention that the appraisals were false or in any way improper (R. 2515-16). If there was a disagreement, *Brietweisser* had the final say in the Committee. *His figure would be the final figure* (R. 2516). The citations in Government's Brief (pp. 6-7), to what are claimed to be excessive, false or "jacked up" appraisals are found, on examination, to relate to valuations made or recommended

by Brietweisser (R., pp. 699; 819, 900), and *Shields* (R., pp. 700; 822-823; Gov. Ex. 797; p. 3109). There is no evidence, as claimed by the Government (Gov. Br. 7), that petitioner raised the figures on any appraisal. The substance of the testimony of Government witness Van Anden (R., pp. 507-8) is not that the petitioner *"raised"* the appraiser's figures, but that he (Van Anden), believed defendants Brietweisser, Kahler, Williams and Mortimer went out to look at the properties to make appraisals thereof before they "changed" the appraisals by Shapiro (R., pp. 507-8; fols. 1520-3). It is significant that Government witness Benjamin Shapiro, the Company's Chief Appraiser who testified at length (R. 2077-2109; 2452-2611) concerning the alleged false, "raised", and "jacked up" appraisals, *did not once,* in the course of his extensive testimony, state, or even intimate, that any appraisal had been raised, jacked up or increased by petitioner, or upon instructions from petitioner (R. 2077-2109; 2452-2611).

E

Title to foreclosed acquired properties and new mortgages thereon.

The charge is made that titles to properties acquired by the Company on foreclosure, were taken in the name of wholly-owned subsidiaries organized for that purpose (Gov. Br. 7). The fact is the Insurance Law of the State of New York limited the amount of real estate that the Company itself could own. This necessitated the creation of corporate subsidiaries (Land Estates, Inc. and Liberdar Holding Corporation), when unusually large acquisitions of real estate, by foreclosure and deed, became necessary in order that investors of the Company be protected.

The Company, through its wholly owned subsidiaries, bid in the properties and obtained control over them, the Company paying tax arrears, reconditioning the properties and operating them until sold, meanwhile paying the interest to

certificate holders (R. 1347). In some cases the Company, after one of its subsidiaries had acquired title to such foreclosed property, made a new mortgage loan against the property and sold mortgage certificates against the new mortgage. The applications by the corporate subsidiaries for mortgage loans were in all respects treated exactly the same as applications made by outside persons (R. 1216; 1347). Transactions between the Company and its subsidiary corporations were recorded on the Company's books and reflected in its Reports to the Insurance Department of the State and in the Company's condensed balance sheets. Such an open and practical handling of a difficult situation in times of great emergency and general economic upheaval, in an effort to protect investors, is no proof of conspiracy and does not constitute fraud (*United States* v. *McNamara*, 91 F. 2d 986, 990).

The Government's further charge that petitioner was a party to the granting of new mortgages to the subsidiary corporations upon improper appraisals is unsupported by the entire Record, as well as by Government's particular citations to the Record (Gov. Br. 7; R. pp. 1725-6; 879; 880-6; 900; 906). Petitioner's position and duties in connection with the subsidiary corporations is misconceived by the Government. Petitioner had charge of the *management of the physical properties* acquired by the subsidiaries on foreclosure or operated under assignments of rent. But the placing of new mortgages on these acquired properties were matters handled by others in the course of the Company's *mortgage loan business.* True, petitioner sat on the Executive Committee which passed upon some of the mortgage loan applications on Land Estates and Liberdar. But there is no evidence of any fraud practiced by petitioner in these matters. Petitioner did not control Land Estates, Inc. Mr. Ritching supervised the operation of these subsidiaries under petitioner's general direction (R. 4775; 5175-7).

Government's citations to the Record (Gov. Br. 7) do not sustain its contention that petitioner was a party to

the alleged false appraisals claimed to have been made in connection with mortgage loans granted to Liberdar and Land Estates, Inc. At page 879 of the Record (cited by Government), Government witness Springsteen testified with respect to instructions which he received from defendant *Brietweisser* concerning extensions of mortgages. There is not the slightest indication or suggestion by Springsteen that petitioner was consulted or knew anything about the mortgage extensions referred to. Also, at pages 880-886 of the Record (cited by Government), Springsteen refers to instructions contained in Government's Exs. 592 and 841 for fixing the amount of certain loans to Liberdar and to the Jamaica Committee appraisal which was used. This Jamaica Committee was composed of Gardiner, Cotter, and the witness Springsteen (of the Company's Jamaica office) and defendant *Brietweisser* from the Company's New York office (R. 2631). It is to be noted that Government Exhibit 592, referred to by Springsteen, was a letter to Cross, of the Brooklyn office, signed by *Brietweisser;* and Exhibit 841 is a letter from *Brietweisser* to Downing of the Company's Staten Island office. There is no evidence that petitioner had anything to do with the subject matter of this correspondence, or that he had any knowledge of it. Springsteen further testified that Mr. Gardiner, Vice President in charge of the Jamaica office, was his superior and that he reported to him; and that defendant *Brietweisser,* of the New York office, came once a week to the Jamaica office for conferences and Jamaica Committee meetings (R. 2655-6). Springsteen's testimony, at page 900 of the Record (cited by Government) relates solely to the "Payne" loan. The evidence is uncontradicted that there was nothing fraudulent with respect to the "Payne" loan. The special reason for making the "Payne" loan was plainly endorsed and written on the face of the appraisal. This particular loan was made by the Company purely as a business matter for the purpose of securing the future title business of the borrower; and the Loan Committee wrote over the face of

the "Payne" appraisal the notation that the loan was made for "title business" reasons, so as to plainly indicate that the "Payne" mortgage was not to be sold but was to be held in the Company's own portfolio (R. 483-9).

F

Petitioner had no knowledge of and did not sanction the use of "dummy" bondsmen.

The proof is definite that petitioner had nothing to do with the Company's alleged practice of using "dummy" bondsmen. In a few instances socalled "dummy" bondsmen were used by the Legal Department, under the supervision of defendant *Burdett,* where the applicants for the loans were either Land Estates, Inc. or Liberdar Holding Corp. The socalled "dummy" bondsmen were employees of the Company; and, as indicated by a Memorandum issued by defendant *Burdett,* "dummy" bondsmen were obviously used for the purpose of saving the Company the expense which would have otherwise been incurred had dummy bondsmen not been used instead of the corporations (R. 5935-6; 5942; Gov. Ex. 1114, R. p. 3242). But this use, by the Title Closing Department upon instructions of defendant *Burdett,* law officer of the Company, of individual bondsmen in place of the corporate applicants (Defs'. Exs. C, D, E, F; R. pp. 9826-36) was something petitioner never sanctioned or knew anything about (R. 4706-9). When petitioner first heard about the practice, in December, 1930, he immediately conferred with Mr. Burdett and told him, "that sort of thing *can not be permitted*" (R. 4706).

Petitioner did not stop there. On December 5, 1930 he sent to the various Company departments the following written order (Defs'. Ex. N (2); R. pp. 9976-8; fols. 4706-7) giving instructions *against the use* of "dummy" bondsmen:

> "I find it is a practice for certain employees to act as 'dummy' incorporators, *mortgage bondsmen* and purchasers in real estate conveyances, etc. While this

practice is somewhat widespread, existing as it does in all offices, it has never had the approval of the Management.

"Recently, several instances have come to our attention wherein employees have been placed in the anomalous position of defendants in law suits. In one case, New York Title and Mortgage Company brought foreclosure suit against a corporation, two of whose directors are employees of New York Title and Mortgage Company. These two directors may have to be placed on the witness-stand as representing the defendant company.

"Not wishing a repetition of such embarrassing experiences, please direct your officers and department heads to instruct employees *not to act as 'dummies' in any transaction.* (Italics ours.)

(signed) GEORGE T. MORTIMER
President"

Petitioner's prompt action in giving written orders, on December 5th, 1930, "that employees were not to act as 'dummies' in any transaction," effectively negatives the charge that petitioner participated in the alleged frauds and conspiracy.

POINT II

The record itself establishes petitioner's innocence; the fact that he was associated with other defendants, officers of the company, does not justify an inference of petitioner's guilt.

The foregoing, page by page, and folio by folio examination of the evidence,—including that part of the Record cited and relied on by the Government,—establishes that petitioner did not knowingly participate in the alleged frauds and conspiracy. The conclusion is inescapable: petitioner's conviction rests upon nothing more substantial than suspicion,—arising solely from the fact of his association, as an officer of the Company, with Kahler, Williams, Bur-

dett, Brietweisser, and Shields, the five men who actually carried on the Company's *mortgage loan and certificate business.* Government, in foot note 7 (Gov. Br. 13), refers to the Company's by-law provision to the effect that the President of the Company was its administrative officer and managed its operations. But these *paper* functions of petitioner are not the realities with which we are dealing, and Government's reference to this particular by-law is but illustrative of the fact that neither the duties of petitioner nor his position in the Company were correctly designated by his official title or the formal by-laws. Advantage is taken of the fact that petitioner had the title of "President" to create the impression that he was the responsible, managing and directing head of the Company. But such was not the fact, as the foregoing analysis (pp. 3-16, this brief) of the Record establishes.* The responsible head of the Company,—its Chief Executive Officer, the Chairman of the Executive Committee, and General Manager *was Williams,* who represented the Manhattan Company which controlled the New York Title Mortgage Company through ownership of its stock.

In fact, a Resolution adopted, April 23, 1931, at a meeting of the Executive Committee (Deft's. Ex. O-2) empha-

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*Government's statement, contained in footnote 7 (Gov. Br. 13-14), to the effect that "petitioner received reports covering every phase of the company's affairs" is an incorrect statement of petitioner's position. The phases of the Company's business, or affairs, *covered by the indictment* (R. 55-112) are the making of alleged fraudulent mortgage loans, alleged fraudulent sales, by use of the mails, of guaranteed mortgages and certificates secured by these loans, and an alleged conspiracy to defraud the public thereby. As heretofore pointed out in this Brief (pp. 3 to 16), petitioner took no active part in the Company's mortgage loan and certificate business during the period in question, 1931-32. Instead, petitioner was actively engaged in managing the physical properties comprising the $200,000,000 worth of the Company's distressed real estate. Examination of the Company Reports referred to in those portions of the Record cited by the Government in footnote 7 (Gov. Br. 13-14) discloses that these Reports did *not relate to the mortgage loan or mortgage certificate* business of the Company. They did relate to the subject matter of arrears and defaults on properties which had been foreclosed or were being foreclosed (Gov. Exs. 489, 490, 491, 1068, 1076, 1077, 1078, and 1079), and to the foreclosure actions against mortgaged premises (Gov. Exs. 498, 1057, 494, 1064, 1065, 1066, 1067, 1068, 1069, 1079, 1071, 1072, 1073, 1074, 1076), and the assignments of the rents of the distressed

(*footnote continued*)

sizes the very negligible part which petitioner had in the actual management of the Company (R. 4714-6). The substance of this Resolution is set forth in a letter (Deft's. Ex. P (2)) of instructions to officers of the Company, stating:

> "At the regular monthly meeting of the Company's Board of Directors, held on Tuesday, April 21, 1931, *Mr. H. Pushae Williams,* Chairman of the Executive Committee, was elected General Manager, thus making him the Company's chief executive officer.
>
> "All officers are directed to confer with Mr. Williams relative to the Company's executive activities, as occasion may require.
>
> HARRY A. KAHLER,
> Chairman of the Board.
>
> GEORGE T. MORTIMER,
> President" (9985-9987).
> (Italics ours.)

The learned Circuit Court of Appeals states, with respect to petitioner's association with the other officers of the Company:

> "He conferred regularly with them on all matters of general importance, and received frequent reports on

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real estate under petitioner's management (Gov. Exs. 308-A to 308-H, inc., 494, 490, 1071, 1072, 1073, 1074, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1076), and to the operation of the physical properties which the Company had taken in on foreclosure (Gov. Ex. 1058). But none of these voluminous Reports which were made to petitioner to aid him in the management of the real estate acquired and being acquired by the Company, contained any information as to what mortgages were in either the group series or specific series against which certificates were being sold. Even Gov. Ex. 1076 relating to sales and re-investments was simply a statement of total sales for the weekly period covered and contained no information as to the condition of the mortgages or certificates sold. Nor did the Reports, or lists, which purported to identify mortgages as salable or unsalable (Gov. Exs. 412, 535, 536, 537) show that those mortgages which were designated as "unsalable" were actually being sold. In fact, the plain implication to petitioner was quite the contrary. The socalled "trouble sheets" (Gov. Exs. 489, 490, 491) contained no information concerning the condition of the mortgages in specific or group series against which certificates were being sold. Petitioner's conviction cannot rest, as Government contends, on the fact that he was a recipient of a vast quantity of information through numerous Company Reports made to him. The crux of the inquiry is: what was the subject matter of these Reports and what information did they convey the petitioner? Analyses of the Reports show that ***they gave the petitioner no information concerning the matters charged in the indictment.***

all aspects of the Company's business. These facts alone would be sufficient to justify an inference that he was not unaware of practices so customary as those demonstrated, or conditions of such general significance. *United States* v. *Dilliard,* 2 Cir., 101 F. 2d 629, 835, certiorari denied 306 U. S. 2 Cir. 106 F. 2d 37, 40, 125 A. L. R. 502, certiorari denied 308 U. S. 589, 60 S. Ct. 115, 84 L. Ed. ———."

Contrary to the above statement, an inference of petitioner's guilt is not justified by the fact that petitioner received numerous Reports, because, as herein before pointed out (*supra,* footnote on pp. 17-18), the reports received by petitioner *related solely to the volume of accumulated distressed real estate* which the Company (and its subsidiaries) acquired or managed under assignments of rent (R. 4773; 5060-1; 5352; 5375). The evidence, at most, creates *a mere suspicion* that petitioner might have had guilty knowledge or might have participated in the alleged frauds and conspiracy, by reason of his close association with other defendants; but it does not rise to the level of proof, and is insufficient to convict. (*Mazurosky* v. *United States,* 100 F. 2d 958; *Copeland* v. *United States,* 90 F. 2d 78, 80.) This principle has special application to the petition during the period in question when the Company was engaged *in two separate and distinct activities,*—that of (1) placing mortgage loans and selling guaranteed mortgages and certificates, and (2) operating a large volume of distressed real estate. The Company's mortgage loan business and the sales of its mortgages and certificates were carried on at its main office and at eleven (11) branch offices, with a personnel of approximately 65 administrative officers and 1700 employees. On the other hand, petitioner was mainly engaged *in the second phase of the Company's business—the management of the distressed real estate from the main office.*

With respect to those isolated instances (such as circular letters bearing petitioner's lithographed name) relied on

by the Government, their unrelated character and the infrequency of their occurrence are enough, of themselves, to establish that petitioner had no guilty connection with the alleged frauds and conspiracy. Petitioner's position comes clearly within the principle of,

> *United States* v. *Rabinowich,* 238 U. S. 78;
> *United States* v. *Kissell,* 218 U. S. 601;
> *Graham* v. *United States,* 15 F. 2d 740.

In *Graham* v. *United States, supra,* the Court said:

> "At the end of the trial the question of the sufficiency of the evidence on the conspiracy count was properly raised. The proof discloses a series of *isolated* transactions, and is circumstantial as to all the defendants tried. Conspiracy is a distinct offense from a crime which may be the object of a conspiracy. *U. S.* v. *Rabinowich,* 238 U. S. 78, 85, 35 S. Ct. 682, 59 L. Ed. 1211. There must be shown to be a combination or understanding, tacit or otherwise, to violate a federal statute, *U. S.* v. *Kissel,* 218 U. S. 601, 607, 608, 31 S. Ct. 124, 54 L. Ed. 1168. There is some proof here that one or more of the defendants were guility of what might be termed overt acts, but none that any two or more of them conspired or combined to commit these *isolated* acts or that they were committed in furtherance of any criminal scheme." (Italics ours.)

> *United States* v. *Dilliard* (101 F. 2d 829) *and United States* v. *Bob* (106 F. 2d 37), *cited by the learned Circuit Court, distinguished.*

The Dilliard case: It was undisputed in the *Dilliard case* that the defendant Dilliard, as President, was the "executive head of the *whole business*", and that his duties were the general supervision of the *entire business.* He personally handled the financial matters of the company (State Title and Mortgage Company), a small company with a total capitalization of only $8,300,000.00. Dilliard, personally, made sales. He had actual knowledge of what mortgage collateral was on deposit in the various pools back of the group Series certificates, such as Series "C" and Series "E", and of

the condition of the mortgages in Series. Dilliard, himself, ordered the withdrawal of every one of the 131 mortgages on deposit in group Series "C", and directed the substitution of the defaulted "Victoria Annex" mortgage in Series "C" in place thereof. Dilliard admitted that he knew that defaulted mortgages were in Series. In fact, the very system whereby good mortgages were withdrawn from Series and defaulted mortgages deposited in Series in substitution therefor was set up pursuant to Dilliard's express orders. The evidence in the Dilliard case showed that Dilliard himself gave directions that a certain note described as "Carlton Land Sales Note" be deposited in Series "E" in substitution for mortgages withdrawn, and that Dilliard testified he knew, at all times, that the mortgage collateral securing the Note was less than the amount of the Note. The State Title and Mortgage Co. was insolvent during the entire period in question, and the evidence showed that Dilliard, who personally handled and supervised its financial matters, knew it was insolvent.

The foregoing discloses the sharp distinction between the *Dilliard case* and the instant case, so far as petitioner is concerned. In the *Dilliard case* the substantial body of proof established that Dilliard not only knew of the alleged frauds and conspiracy, but that the same were carried out pursuant to his personal orders and directions. In the instant case, there is no substantial proof that petitioner either knew of or participated in the alleged frauds and conspiracy. All of the substantial evidence is as consistent with petitioner's innocence as with his alleged guilt.

United States v. *Bob, supra,* is also sharply distinguished from the instant case, as appears from the following statement contained in the Opinion of the Court in that case:

> "Admittedly he (Bob) had sent letters to stockholders of the kind cited above, which he knew contained false and misleading statements" (p. 40).

POINT III

There is conflict between the decision of learned Circuit Court of Appeals herein and decisions of other Circuit Courts of Appeals on the construction and application of the Federal Conspiracy Statute.

Petitioner contends that by reason of the facts of the instant case, *as they relate to him*, the learned Circuit Court of Appeals, in affirming petitioner's conviction, has in its construction and application of the Federal Conspiracy Statute, 18 U. S. C. A., Section 88 (Criminal Code Section 37), (a) rendered a decision in conflict with the decisions of other Circuit Courts of Appeals, on the matter (*Graham* v. *United States,* 15 F. 2d 740 (C. C. A. 8); *Weniger* v. *United States,* 47 Fed. 2d 692 (C. C. A. 9); *Dahly* v. *United States,* 50 Fed. 2d 37 (C. C. A. 8); *Mazurosky* v. *United States,* 100 F. 2d 958 (C. C. A. 9); and *Copeland* v. *United States,* 90 F. 2d 78 (C. C. A. 5); and (b) has decided a Federal question in a way probably in conflict with applicable decisions of this Court (*United States* v. *Rabinowich,* 238 U. S. 78; *United States* v. *Kissel,* 218 U. S. 601; *Durland* v. *United States,* 161 U. S. 306). The public interest will be promoted by prompt settlement in this Court of the questions involved.

POINT IV

In criminal cases this Court has power to grant certiorari where the decision of the lower court was erroneous.

The foregoing analysis of the Record leaves no doubt that the learned Circuit Court's decision of affirmance was erroneous. In a *criminal case* this Court has power to grant certiorari, even in non-conflict cases, in order to correct obvious error and because the decision of the Court below was

wrong (*Alfort* v. *United States,* 282 U. S. 687; *Husty* v. *United States,* 282 U. S., 694; *Escoe* v. *Zerbst,* 295 U. S., 490; *McBoyle* v. *United States,* 283 U. S., 25).

The petition should be granted, so that the wrong resulting from the conviction of petitioner may be rectified.

POINT V

Government's Brief does not sustain the conspiracy count.

The cases cited by Government (Gov. Br. 15) do not sustain the conspiracy count as a sufficient pleading. *Hagner* v. *United States* (285 U. S. 427), simply applies the principle that loose or inartificial averments will be disregarded; but that case does not vary the rule which requires that essential elements of an offense must be alleged. The decision in the *Hagner case* turned on the provisions of Sec. 1025 Revised Statutes (U. S. C. A. Title 18, Sec. 556), which provides:

> "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection *in matter of form only,* which shall not tend to the prejudice of the defendant." (Italics ours.)

In the instant case the defect is one of *substance* and not form; accordingly, Section 1025 R. S., and *Hagner* v. *United States* have no application. *Rosen* v. *United States* (161 U. S., 29) dealt with the sufficiency of an indictment charging violation of the statute (R. S. Sec. 3893) against use of the mails for transmitting obscene literature; and *Cochran and Sayre* v. *United States* (157 U. S., 286), with the sufficiency of an indictment charging a violation of *Rev. Stat.* Sec. 5209, against the making of a false entry in a national bank report.

In neither the *Hagner, Rosen,* nor *Cochran and Sayre* case did this Court have before it the question of the sufficiency of a conspiracy count. Government's assertion (Gov. Br. 15), that the conspiracy count is

> "supplemented in further detail by bills of particulars,"

is definitely misleading. The fact is that that part (R. 125 i-123 k) of petitioner's motion which requested a bill of particulars of the *conspiracy count was denied* (R. 121 n-121 u; 122 ff-123 ff). Each count of an indictment is a separate charge (*United States* v. *Albers,* 115 F. 2d, 833); and a conspiracy to defraud by *misuse* of mails is a substantive offense, and is distinct from the offense of merely forming a scheme to defraud by use of the mails for that purpose (*U. S.* v. *Momsen,* 115 F. 2d, 635).

The fact, as pointed out by the Government (Gov. Br. 14), that twelve specific overt acts are recited in the conspiracy count, does not make the count, which is otherwise defective, sufficient. The alleged overt acts are *no part of the conspiracy charge* itself, as a matter of pleading (*Bell* v. *United States,* 2 F. 2d 543, 544); nor can the conspiracy count be aided, as to sufficiency, by the averments found in the overt acts alleged (*United States* v. *Britton,* 108 U. S., 199).

POINT VI

The application for writ of certiorari should be granted.

Respectfully submitted,

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